Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-259
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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SUMMARY

In these Reply Comments, NBC makes the following points:

1. There is no basis for the contention that non-duplication protection is not applicable to stations electing retransmission consent. The Senate Report proposing what has become Section 325(b) makes clear the Congressional intent to afford such stations non-duplication protection.

2. The Cable Act provides for election of retransmission consent status for the geographic area served by each cable system, not for the ADI. The Senate Report specifically states the Congressional intent in this regard.

3. The Commission should establish a deadline no earlier than August 2, 1993 for stations to notify cable systems of their election between the right to grant retransmission consent and the right to signal carriage. Each station will have to negotiate with dozens of cable systems in its ADI, and each cable system will have to negotiate with many stations as well. All of this will take time, and none of it will commence until the Commission acts in this proceeding in April.

4. The Commission should adopt a broad definition of "program-related material." In particular, it should not adopt a copyright law test because the court opinion describing that test was clarified by the same panel which expressly concluded that for that test "more than 'relatedness' is required."

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REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC"), by its attorneys, hereby files its reply comments concerning the Notice of Proposed Rule Making in this proceeding.

NBC has previously filed comments herein. In those comments, we urged the Commission to adopt expeditiously a broad regulatory framework that will guide the cable and broadcast industries, local governments and the Commission in the immediate task of complying with the far-reaching new statutory scheme envisioned by the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act").

Many of the matters raised by other commenters fall in the category of questions and issues that will enmesh and entrap the Commission at this time in details that will delay compliance with necessary statutory timetables or divert the Commission's attention from the broader and more important issues. NBC will not address those matters in these Reply Comments, but will instead confine itself to a few issues of broad applicability.

I THERE IS NO BASIS FOR THE CONTENTION THAT NON-DUPLICATION PROTECTION IS NOT APPLICABLE TO STATIONS ELECTING RETRANSMISSION CONSENT

Several cable operators or their representatives (e.g., Time Warner Entertainment Company, L.P. ("T/W") and National Cable Television Association ("NCTA")) have argued that if stations elect retransmission consent rather than must-carry status, they should lose their protection under the Commission's network non-duplication and syndicated program territorial exclusivity rules. No citations of law or rule are offered for these propositions, and their argument seems to rest on allegations of "unfairly weighting" the bargaining power of stations vis-a-vis cable systems.

These cable operators' basic quarrel is with the Cable Act, not with the Commission's non-duplication provisions which existed before the Cable Act was adopted.

Congress' purpose in requiring retransmission consent was to correct a prior imbalance in favor of cable (created by prior laws and/or Commission interpretations thereof[1]). Indeed, one of the Cable Act's Findings was:

> At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries. (Section 2(a)(19)).

Congress intended that "program services which originate on a broadcast channel should not be treated differently" from the cable programming services cable operators offer to their customers. Senate Report at p. 35. Cable operators

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[1] E.g., see Senate Report 102-82, 102d Cong. 1st Sess. ("Senate Report"), p. 35.

do not and would not claim the right to carry cable programming services without appropriate consent, so they cannot balk now that they are required to get consent for carriage of broadcast program services as well.

The Senate Report, which originally proposed what has become Section 325(b), very clearly states explicitly that the intent of the Cable Act is to continue to apply the Commission's non-duplication and syndicated exclusivity rules to stations electing retransmission consent as well as must-carry. That Report states:

> In most respects, however, the Committee believes that he rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise.
>
> In that connection, the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12. (at p. 38, emphasis added).

Beyond the clearly stated Congressional intent, there is of course the basic fairness in allowing the local station and the local cable system to negotiate for carriage of the station's programs free of the threat by the cable operator

to import from some distant market the same network and syndicated programs broadcast by the local station. The Congress intentionally created a situation where the station and the cable system can both gain from making an agreement and can both lose from not doing so. The Commission should not upset that balance as requested by the cable operators.

II THE CABLE ACT PROVIDES FOR ELECTION OF RETRANSMISSION CONSENT STATUS FOR THE GEOGRAPHIC AREA SERVED BY EACH CABLE SYSTEM, NOT FOR THE ADI

The NCTA argues that each station must make a single choice when it elects retransmission consent or must-carry, which must apply to all cable systems in its entire ADI (NCTA Comments, pp. 26-28). Otherwise, claims NCTA, stations would somehow have "leverage" in their side of the negotiations.

This argument is simply contrary to the Cable Act and its legislative history. Indeed, NCTA offers no citation to the Act to support its view. However, the Senate Report, in discussing this issue, stated:

> S. 12 provides that each television station which has carriage and channel positioning rights under sections 614 and 615 will make an election between those rights and the right to grant retransmission authority for each local cable system before the amendments to section 325 become effective, and every three years thereafter. The bill provides that a broadcaster's election with respect to one cable system will apply to any so-called

overbuild systems which serve the same geographic area. (at p. 38, emphasis added).

And in the Conference Report, the reference to "geographic area" clearly refers to the geographic area served by a cable system, not to the ADI or the geographic area served by the station.[2] And Section 325(b)(4) also makes it clear that where there is an election of retransmission consent "with respect to a cable system, the provisions of Section 614 [must-carry] shall not apply to the carriage of the signal of such station by such cable system" (emphasis added) -- not all the systems in that ADI.

III THE COMMISSION SHOULD ESTABLISH A DEADLINE NO EARLIER THAN AUGUST 2, 1993, DEADLINE FOR STATIONS TO NOTIFY CABLE SYSTEMS OF THEIR ELECTION BETWEEN THE RIGHT TO GRANT RETRANSMISSION CONSENT AND THE RIGHT TO SIGNAL CARRIAGE

The cable operators generally have proposed that the Commission establish an early date[3] for stations to notify

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[2] "In situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems." (House of Representatives Report 102-862, 102d Cong., 2d Sess., 76.)

[3] E.g., T/W proposes May 1, 1993 (Comments, p. 47) and NCTA proposes June 1, 1993 or the effective date of the rules to be adopted in this proceeding, whichever is earlier (Comments, p. 28).

cable systems of their elections under Section 325(b)(3)(B) between the right to grant retransmission consent and the right to signal carriage, while broadcasters generally favor a later date.[4]

In part, at least, this dichotomy appears to stem from a difference in their concepts of the expected negotiation and election process. Broadcasters appear to expect that discussions between cable operators and stations will occur before stations make their elections, while cable operators appear to expect that stations will first make their election as to each cable system and then only those that choose the retransmission consent alternative will negotiate with those cable systems so elected.

Indeed, NCTA goes further and asks the Commission to rule "that retransmission consent negotiations between a local station and system cannot take place until the election is made" (Comments, p. 30, emphasis added). Its

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[4] E.g., NAB proposes August 2, 1993 (Comments, p. 44) and the Association of Independent Television Stations, Inc. proposes October 6, 1993 (Comments, p. 23).

theory is that if negotiations take place first, and do not "go well," a station will opt for must-carry status and that will somehow give it unequal bargaining leverage. Of course, if the station irrevocably elects retransmission consent and the negotiations do not "go well," the station's programs will not be carried by the cable system, and both of them will suffer -- but more important, the public subscribing to that cable system will be deprived of that station's programs for three years.

This negotiation process will therefore be important for all parties, including the public, and should not be regarded as a gladiator contest to be "won" by anyone. NBC believes the Commission should do everything possible to encourage broadcasters and cable operators to enter into agreements which, by definition, requires that both sides believe what they are agreeing to is an acceptable resolution. In the words of the Senate Report:

> It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations." (at p. 36)

The Senate Report goes even further, to express its anticipation that the Commission's rules will permit "the fullest applications of whichever rights [i.e.,

retransmission consent or signal carriage] each television station elects to exercise." That Report states:

> In most respects, however, the Committee believes that the rights granted to stations under section 325 and under section 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise.[5] (at p. 38).

This Senate "anticipation" can only be fulfilled if the Commission allows the greatest possible period for the parties to negotiate agreements, especially in what is bound to be a difficult initial period. Stations should not be

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[5] Cable operators appear to believe that because a station elects retransmission consent, all the provisions applicable to a signal carriage election are forfeited (e.g. NCTA Comments, p. 33). The quoted statement from the Senate Report makes it clear that this belief is contrary to the Congressional intent. Congress expressly stated its anticipation that the Commission would adopt rules "which will permit the fullest applications of <u>whichever</u> rights each television station elects to exercise." Thus, to give another example of cable operators' erroneous contentions, NCTA's suggestion (Comments, p. 33) that if a network affiliate elects retransmission consent, that will automatically free the cable system to choose to carry <u>another</u> affiliate's signal, is also entirely mistaken. That approach, according to which the very election the station makes would deprive it of all its statutory rights to have that election protected, demonstrates that NCTA is seeking through its various proposals to undercut the Congressional intent to rectify the competitive imbalance Congress found to exist.

required to make an election before all the possibilities of an agreement between the cable system and the station have been fully explored. Clearly, agreements will generally be a more satisfactory resolution for both parties if they can reach one. But each station will have to negotiate with dozens of cable systems in its ADI, and each cable system will have to negotiate with many stations as well. All of this will take time -- and none of it will commence until the Commission acts in this proceeding in April. The Commission should allow the parties at least four months to negotiate their agreements and not set a deadline for stations to make their elections which would be prior to August 2, 1993. The Commission should also expressly decline to adopt NCTA's proposal to require elections to be made before negotiations.

IV THE COMMISSION SHOULD ADOPT A BROAD DEFINITION OF "PROGRAM-RELATED MATERIAL"

In our Comments filed in this proceeding, NBC urged the Commission, in accordance with the requirements of new Section 624(e), to adopt minimum standards for the technical operation and signal quality of all cable systems, including retransmission consent and must-carry channels (pp. 15-16). The comments of a number of parties express various views on the extent to which the Cable Act requires cable operators

to carry program-related material carried in the vertical blanking interval (VBI) or on subcarriers.

NBC disagrees with those who support a copyright law test for whether material is program-related. The copyright law test is clearly not a "program-related" test. We support the NAB Comments, which point out that technically it will become easier for cable systems to carry VBI or subscriber material, both because of the form of the signal and because the capacity of cable systems is increasing (pp. 24-26).

The copyright test adopted by the Seventh Circuit in WGN Continental Broadcasting Co. v. United Video, 628 F.2d 622, reprinted 693 F.2d 622, 51 RR 2d 1617 (1982), cited in the Notice (¶ 32), was the subject of a clarifying opinion in that very case by the same panel that issued the original decision. WGN Continental Broadcasting Co. v. United Video, 693 F.2d 628, 52 RR 2d 1693 (7 Cir. 1982). In its clarifying opinion, the court expressly stated (52 RR 2d at 1694) that for the copyright test "more than 'relatedness' is required" (emphasis added), and concluded that in that case, the additional requirements were in fact present. Thus, that case cannot be used to define "program-related"

material under the Cable Act because the standard the court used was avowedly more restrictive than the Cable Act's standard.

NBC does not believe that "program-related" material needs to be seen by the same viewers as see the broadcast program or advertising, or during the same time interval, or be an integral part of the program. For example, material can be "program-related" if it is any of the following: It can be statistics connected with sports programming being broadcast at the time or later; program previewing information; broadcast schedules; information about advertisers, including coupons for advertised products or services; product or service order forms; additional information on subjects covered in news programs; recipes for dishes shown or mentioned on programs; information on where to find advertised products or services; information on where to find products or services mentioned in news and information programs, etc. Any definition of "program-related material" should include all program-related material transmitted on the video signal even if special equipment in addition to the television receiver is needed for decoding and displaying or printing the information, and even if a special fee must be paid for

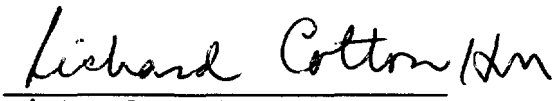
the service. All that the Act requires is that it be related to a program in some way.

The Commission should also be careful to leave open-ended any definition it may adopt. This is a dynamic medium and technology, and we cannot foresee now all the program-related uses to which the VBI or subcarriers may be put. Therefore, any description of "program related material" should be set forth as a minimum and should allow for expansion as additional uses are developed.

CONCLUSION

The Commission should proceed expeditiously to adopt rules providing the broad framework within which the industries, local governments and the public can begin to comply with the Cable Act. To that end, NBC urges the Commission to adopt the principles set forth in these Reply Comments and in NBC's Comments filed earlier herein.

Respectfully submitted,



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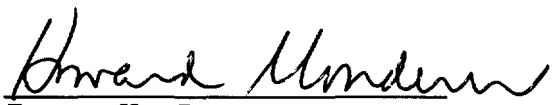

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January 19, 1993

CERTIFICATE OF SERVICE

I, Martha A. Shiles, do hereby certify that on this 19th day of January, 1993, I caused copies of the foregoing Reply Comments of National Broadcasting Company, Inc. to be served, via First Class postage, pre-paid mail, to:

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